

PUBLIC BENEVOLENT INSTITUTIONS, TAX CONCESSIONS AND POLITICAL ADVOCACY IN AUSTRALIA

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Introduction

In Australia there are three financially significant tax concessions under the federal income tax and fringe benefits tax (FBT) regimes for specific not-for-profits (NFPs).¹ These are the exemptions from income tax and FBT and the tax deductibility of gifts.

Public Benevolent Institutions (PBIs) are a type of charity that is unique to Australia. PBIs are eligible for all three tax concessions. While there is no statutory definition of PBI in the Australian income tax legislation, the cases have determined that they must be a not-for-profit (NFP) institution that is organised, promoted or conducted for the relief of poverty, sickness, disability, destitution, suffering, misfortune or helplessness.² They are therefore very similar to charities for the relief of poverty, but not exactly the same.

The 2015 tax discussion paper released by the Federal Treasury states that ‘NFP tax concessions result in significant revenue foregone. The two largest groups of tax concessions involve exemptions from paying fringe benefits tax ... and income

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1 The Australian Taxation Office (ATO) defines a NFP as an organisation that either by its constituent document or by operation of law (for example, a statute governing the organisation) is prevented from distributing its profits or assets among members while it is operating and on its winding-up: ‘Public Benevolent Institutions’ (Taxation Ruling 2003/5, 4 June 2003) [78].

2 *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224, 232.

tax deductions for making gifts'.³ These two concessions however only apply to specific NFPs, such as PBIs. The income tax exemption applies to all entities that satisfy the definition of charity.⁴

FBT was introduced in 1986 to overcome the actual and perceived lack of application of income tax law to non-cash benefits paid to employees in lieu of salary.⁵ The Fringe Benefits Tax Assessment Act 1986 (Cth) (FBT Act) imposes FBT on a range of defined benefits paid by employers to their employees. The tax is not however paid by the employee but by the employer.⁶

The dollar amount of a donation to an eligible entity, referred to as a Deductible Gift Recipient (DGR), may be claimed as a deduction from assessable income in the donor's annual income tax return.⁷ The Income Tax Assessment Act 1997 (Cth) (ITAA97) requires that an entity seeking DGR status must be endorsed by the Australian Taxation Office (ATO) as a DGR. DGRs can either be 'entities' or 'government entities'.⁸ DGRs include PBIs, NFP hospitals, public hospitals and certain government entities such as government school building funds as well as specific charities.⁹

The income tax exemption is found in Division 50 of the ITAA97. All income of the types of entities specified in this Division (which includes PBIs¹⁰ and charities), no matter from what source, is exempt from taxation. Unlike in many other countries,¹¹ this includes income generated by the PBI or charity's commercial activity.¹²

3 Treasury, 'Re:think, Tax Discussion Paper' (2015) 124.

4 Income Tax Assessment Act 1997 (Cth) (ITAA97) div 50.

5 R Woellner et al, *Australian Taxation Law* (CCH 2014) [26-000].

6 FBT Act, s 66.

7 ITAA97, s 30-15.

8 ITAA97, s 30-227.

9 ATO, 'Deductible Gift Recipients' available at https://www.ato.gov.au/Non-profit/Gifts-and-fundraising/In-detail/Deductible-gift-recipient/FAQs/Deductible-gift-recipients---FAQs/?page=1#What_is_a_DGR

10 ITAA97, ss 50-5, 995-1. Section 995-1 states that a registered public benevolent institution means an institution that is: (a) a registered charity; and (b) registered under the Australian Charities and Not-for-profits Commission Act 2012 as the subtype of an entity mentioned in column 2 of item 14 of the table in subsection 25-5(5) of that Act.

11 See e.g. on the tax on business profits of charities in the USA, M Burch, 'Australia's Proposed Unrelated Commercial Activities Tax: Lessons from the US UBIT' (2012) 7 *Journal of the Australasian Tax Teachers Association* 21.

12 See *Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204.

The tax expenditure for gifts to tax deductible entities is stated by the Australian Federal Treasury to be \$1.21 billion in 2012-13 and estimated to be \$1.23 billion in 2013-14 and \$1.33 billion in 2014-15.¹³ The Australian Bureau of Statistics estimated that in 2006-07 (the most recent figures available), donations by individuals and corporations totalled \$5.1 billion.¹⁴ This is a significant subsidy by the federal government to taxpayers donating to eligible NFPs and a significant leakage of revenue from the federal system. The QUT Australian Centre for Philanthropy and Nonprofit Studies states that individual donations claimed as a tax deduction for 2010-11 was \$2.21 billion. This figure excludes corporate and trust taxpayers and other types of contributions such as raffles, sponsorships, fundraising purchases or volunteering.¹⁵ Total donations as a percentage of the gross domestic product of Australia for 2004, was estimated by the Productivity Commission to be 0.69 per cent.¹⁶

There is no estimate for the potential revenue foregone due to the income tax exemption.¹⁷ As charities do not lodge annual income tax returns there is no accurate way of estimating the taxable income that they might have received during any financial year. It is also possible that in many instances they expend all amounts received during the year so that there is no taxable income on which there is a tax liability.¹⁸

The FBT exemption is however able to be determined, as the liability for FBT rests on employers¹⁹ and they are required to lodge annual FBT returns.²⁰ The tax concession for FBT exemptions was estimated as costing revenue \$1.34 billion for

13 Treasury (Cth), *Tax Expenditures Statement 2014* (30 January 2015) available at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/TES-2014>

14 Australian Bureau of Statistics, *Not-for-Profit Organisations, Australia*, (81060DO001_200607, 2006-07).

15 QUT, The Australian Centre for Philanthropy and Nonprofit Studies, 'Tax Deductible Giving in 2010-2011' (August 2013) available at http://eprints.qut.edu.au/61722/1/2013_1_Tax_DED_Giving_07082013_FINAL.pdf

16 Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010) Appendix G, Tax Treatment of Charitable Giving, G10.

17 Treasury (Cth), *Tax Expenditures Statement 2013* (30 January 2014) 76 available at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2014/TES-2013>

18 Taxable income is equal to assessable income less deductions: see ITAA97, ss 4-15. See M McGregor-Lowndes, 'Public Private Accountability: Exempt Status of Charitable Organisations' (Seminar Paper for Social Policy and Research Centre, University of New South Wales, 20 February 2003).

19 FBT Act, s 66.

20 *ibid* s 68.

the 2013-2014 financial year.²¹ When the data is broken down to determine the FBT foregone in respect of PBIs it is estimated that the revenue was almost \$1 billion in 2010-11, over \$1.4 billion in 2014-15 and is estimated to increase to \$1.6 billion by 2017-18.²² There is a \$30,000 cap for most fringe benefits paid to employees of PBIs. Prior to November 2015, meal entertainment benefits and entertainment facility leasing benefits were not capped.²³ Tax expenditure on this concession was estimated to be \$430 million in 2013-14 and is estimated to rise to \$545 million in 2017-18.²⁴

This article discusses the historical and legal development of the PBI concept, the application of the three tax concessions, and traces through the rationale for granting this entity, above charities and other NFPs, these major concessions. It concludes with a discussion of whether or not PBIs can engage in political activity or advocacy. The article is divided into three parts. Part I discusses the historical and legal development of the statutory concept of PBI. Part II discusses the application of each of the tax concessions to PBIs and highlights some of the concerns that have been raised in respect of the targeting of these concessions to PBIs. Part III analyses the limitations of PBIs engaging in political advocacy or activity.

Part I: The Historical and Legal Development of Public Benevolent Institutions

The introduction leads to the important discussion of what exactly are PBIs. The first time that an exemption for charities was mentioned in a federal statute was the Estate Duty Assessment Act 1914 (Cth) (Estate Duty Act) although the term charities was not defined. This Act contained an exemption from estate duty for organisations with a charitable purpose.²⁵ The first federal income tax legislation in Australia was enacted a year later.²⁶ It also contained an exemption for charities,²⁷ and again the term was not defined in the legislation. The question of the definition of 'charitable' in the context of the Estate Duty Act came before the High Court of Australia in 1923 in the case of *Chesterman v Federal*

21 Treasury, *Tax Expenditures 2013* (n 17) 12, 44, 115. The fringe benefits tax exemption for PBIs was estimated to be \$1.34 billion for 2013-14.

22 Treasury, *Tax Expenditures 2014* (n 13).

23 Treasury, 'Re:think' (n 3) 126.

24 Treasury, *Tax Expenditures 2013* (n 17).

25 Estate Duty Assessment Act 1914 (Cth), s 8(5).

26 Income Tax Assessment Act 1915 (Cth).

27 *ibid* s 11.

Commissioner of Taxation.²⁸ At this judicial level the court held that the term ‘charitable’ was limited to ‘the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief’.²⁹ This approach received significant support in Australia in the early part of the 20th century. In 1926 Isaacs J clearly expressed his support in several cases, culminating in a cry for the ‘popular’ sense of charity to be legislated.³⁰

The *Chesterman* case was appealed to the Privy Council³¹ which held that ‘charitable’ had a wider definition than its ordinary meaning and that the legal meaning, as established in *Commissioners for Special Purposes of the Income Tax v Pemsel*, applied.³² The result was that the estate duty exemption for charities was then applied to a broad group of publicly beneficial NFPs that were also for the relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community.³³ The response by the federal legislature to the *Chesterman* case was to develop the PBI, a more limited category of exempt entity that was more akin to the ordinary meaning of charitable rather than its extended legal meaning.³⁴

There is no statutory definition of PBI in the ITAA97. They must be NFPs and they are often considered a subset of charities.³⁵ But PBI is not synonymous with ‘charity’ in Australian law. The High Court has stated that it must have an ‘eleemosynary’ character,³⁶ whereas it is not necessary for an organisation seeking charitable status to be eleemosynary. The PBI must be an institution that is organised, promoted or conducted for the relief of poverty, sickness, disability, destitution, suffering, misfortune or helplessness.³⁷

28 (1923) 32 CLR 362.

29 *ibid* 364 per Isaacs J.

30 *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351, 358-359. See also Isaacs J in *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377; *Chesterman* (n 28).

31 [1926] AC 128. The Privy Council was the final judicial arbitrator for Australian law at that stage.

32 [1891] AC 531.

33 *ibid*.

34 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths 2010) [2.28].

35 *ibid* [2.29]; A O’Connell, ‘The Tax Position of Charities in Australia - Why Does It Have to be So Complicated?’ (2008) 37 Australian Tax Review 17; ATO (n 1) [24].

36 *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399, 411.

37 *Perpetual Trustee* (n 2) 232.

The term 'Public Benevolent Institution' is found in various pieces of state and federal legislation. However, as there is no statutory definition one must turn to the case law to determine the term's meaning. This suggests, broadly, that PBIs are institutions, which means an establishment, organisation or association instituted for the purposes of some object (in this case, a public benevolent object). The word 'institution' would not ordinarily refer to a mere trust.³⁸ An organisation is public where it provides relief to needy members of the community at large, and is not limited to specific persons, particularly to those defined through their personal, social or employment relationships. Factors such as public control or management, and public or government funding, may indicate whether an organisation is public in the requisite sense but they are not determinative.³⁹

Even before the introduction of the PBI, the concepts of charity and benevolence were not considered the same. In 1804 a trust for gifts for 'objects of benevolence and liberality' failed,⁴⁰ and 100 years later a gift for 'charitable or benevolent purposes'⁴¹ also failed on the grounds that there was a non-charitable purpose being 'the benevolent purposes'.

Dunn argues that benevolence, in its ordinary meaning, is only one aspect of charity. She states:⁴²

On one dimension, the purpose of charity may be said to be benevolence, that is, the simple act of redressing need. This first dimension identifies charity with the poor. Poverty in this sense is construed widely and beyond financial restrictions to mean those within society who have a fundamental lack of opportunities and choices for action ... In providing opportunities and choices, this focus may be termed the provision of an 'option for the poor'.

But on a second dimension, the implementation of that benevolence and the act of redressing need reveal charity's more fundamental aims and nature. In its association between relieving and doing, or in Loch's words 'Striving to fulfil the mind's purpose', charity necessitates a look beyond the immediate need to tackle the cause. At this level charity more specifically represents a 'call to action', and is typified by innovation, effecting change, searching for solutions, pushing the boundaries,

38 See, for example, *SIM Australia (as trustee for SIMAID Trust) v Federal Commissioner of Taxation* 2007 ATC 2243.

39 ATO (n 1) [18]-[19].

40 *Morice v The Bishop of Durham* (1804) 32 ER 399.

41 *Attorney-General v Metcalfe* (1904) 1 CLR 421.

42 A Dunn, 'Charity Law as a Political Option for the Poor' in C Mitchell and S Moody (eds), *Foundations of Charity* (Hart Publishing 2000) 57, 64.

challenging existing order, being a 'Creative ferment in a free society', giving a reason for hope and providing the opportunities and choices that the poor lack.

Dal Pont comments that at law, charity shares no identity with benevolence or philanthropy.⁴³ He points out that Viscount Simon stated that the word benevolent lacks legal precision and that although charitable and benevolent 'overlap in the sense that each of them, as a matter of legal interpretation, covers some common ground, but also something which is not covered by the other'.⁴⁴

Benevolence in the PBI context is not confined to practical and material interests and needs, but may extend to the promotion of culture.⁴⁵ However, 'needs' that are to be met by education, training or the promotion of cultural or social objectives will not normally arouse community compassion and call forth the giving of benevolent relief, although they might do so where the needs arise from poverty or helplessness. An institution with an independent and main object of fostering cultural values of a particular group is unlikely to be 'benevolent' in the requisite sense.⁴⁶

The condition or misfortune that is relieved by a PBI will be of a type that arouses pity or compassion in the community. The PBI 'needs' criterion might be caused by poverty or lack of financial resources and this will satisfy the requirement. Disability or sickness can also give rise to misfortune or helplessness. In *Federal Commissioner of Taxation v Launceston Legacy*⁴⁷ the Launceston Legacy provided relief to dependants of deceased ex-servicemen without regard to their financial circumstance. The court held that the institution was a PBI, even though the recipients of its benefits were not necessarily in necessitous circumstances. Northrop J stated that it provided a 'caring service, not limited to the provision of money to persons in need'.⁴⁸ The needs requiring benevolent relief are limited to human needs. Accordingly, an organisation for the relief of suffering animals will not be a PBI.⁴⁹

43 GE Dal Pont, 'Conceptualising "Charity" in State Taxation' (2015) 44 Australian Tax Review 48, 58.

44 *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson* [1944] AC 341, 348-349.

45 *Tangentyere Council Inc v Commissioner of Taxes* (1990) 21 ATR 239, 248.

46 *Maclean Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 143.

47 (1987) 15 FCR 527.

48 *ibid* 541.

49 *Federal Commissioner of Taxation v Royal Society for the Prevention of Cruelty to Animals Qld Inc* (1992) 92 ATC 4441.

Fees charged for the provision of services will be one of the factors to be considered in determining whether an organisation is a PBI. The type and level of charges and any waiver policy may, in light of the types of services provided, indicate that an organisation is not primarily for the relief of distress and suffering.⁵⁰ For example, in *Repromed Pty Ltd v Lucas Debelles* J held that ‘the concept of public benevolent institution should [not] be extended to include a body which is, in all respects, a medical clinic providing specialist medical services, in most cases, upon payment of a fee and where four-fifths of those fees are paid by Government agencies’.⁵¹

The ATO states that whether a particular organisation is a PBI is a matter of fact and degree dependent upon a consideration of:⁵²

1. the objects, powers and membership criteria set out in the organisation’s constituent documents;
2. legislation affecting its rules, powers and so on;
3. the policies and procedures which guide its operations; and,
4. the activities and operations that it actually performs, including: the uses and sources of funds and property; the activities of the executive body, and the duties and tasks of employees and volunteers.

Until recently the ATO had considered that in order for a NFP to be a PBI it had to provide relief to those, in need ‘directly’.⁵³ For this assertion, the ATO had relied on the 1931 High Court decision of *Perpetual Trustee Co v Federal Commissioner of Taxation*,⁵⁴ along with several subsequent cases.⁵⁵ However in *Commissioner of Taxation v The Hunger Project* the Full Federal Court held that the taxpayer in question, Hunger Project Australia was a PBI.⁵⁶ It was an institution organised or conducted for the relief of poverty, sickness, destitution or helplessness by reason of raising funds for the purpose of giving the funds to associated entities to employ in hunger relief programs.⁵⁷ By implication, the

⁵⁰ *Lemm* (n 36).

⁵¹ [2000] SASR 575 [43].

⁵² ATO (n 1) [23].

⁵³ *ibid.*

⁵⁴ n 2.

⁵⁵ In particular, *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax (NSW)* (1985) 1 NSWLR 567.

⁵⁶ [2014] FCAFC 69.

⁵⁷ *ibid* [67].

court found that Hunger Project Australia conducted itself in a public way towards those in need of benevolence by relieving hunger via its associated network organisations, and the relief it provided did not need to be direct in order to gain PBI status.⁵⁸

Part II: The Federal Tax Concessions, their Evolution and Criticisms of their application to PBIs

The Income Tax Exemption

As discussed earlier in this article, all the income of PBIs, like charities, is exempt from income tax. The earliest federal taxation laws in Australia granted this exemption to charities and essentially followed the English tradition in this regard.⁵⁹ McGregor-Lowndes argues that this exemption makes sense as charities and other NFPs may not be the appropriate objects of taxation which primarily applies to individuals and to companies and some other entities in their capacity as agents for individuals.⁶⁰ As Krever pointed out in 1991, 'Australian tax law recognises individuals as the appropriate unit on which to impose income taxes'.⁶¹ Trusts and partnerships are merely treated as the conduit through which income flows to the beneficiaries or the partners who are the ultimate taxpayers.⁶² While companies pay tax, their shareholders do as well, and these shareholders are granted a credit for the tax paid at the corporate level under the dividend imputation system.⁶³ The 1995 Industry Commission report into charitable organisations also supports the exemption. It noted that, unlike ordinary taxpayers, there are conceptual difficulties in identifying gross income and business expenses of charities as much of their income is from donations and government grants and their expenditures related to service provision which is not necessarily the generation of taxable income.⁶⁴

58 *ibid.*

59 See generally O'Connell (n 35).

60 McGregor-Lowndes (n 18).

61 R Krever, 'Tax Deductions for Charitable Donations: A Tax Expenditure Analysis' in R Krever and G Kewley (eds), *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Australian Tax Research Foundation, 1991) 1, 3.

62 Income Tax Assessment Act 1936 (Cth) (ITAA36), divs 5-6. E.g. ITAA36, s 96 specifically states that the aim of div 6 is that beneficiaries are liable for income tax on income from the trust.

63 ITAA97, div 202-207.

64 Australian Government, Industry Commission, *Charitable Organisations in Australia: Overview* (Report No 45, 1995) 275; Dal Pont, 'Conceptualising "Charity"' (n 43) 49.

McGregor-Lowndes also notes that the imposition of income tax on charities and other NFPs such as PBIs would not result in much additional revenue as the tax applies to taxable income and such entities could simply use up any surplus in a particular year.⁶⁵ The 1995 Industry Commission report also supports this argument.⁶⁶

An alternative view which is suggested by Dal Pont is that the income tax exemption compensates charities for the fact that they cannot raise capital. As NFP entities, charities are not able to issue shares and have limited access to debt financing.⁶⁷

There does appear to be a general acceptance that the provision of the income tax exemption is an appropriate way for government to assist charitable activities,⁶⁸ and there is little specific criticism of this exemption for PBIs. Krever makes the case:⁶⁹

In the end, tax policy observers can only note that the non-taxation of income derived by charities and of benefits received by charitable beneficiaries as a consequence of the application of that income probably amounts to a tax expenditure in some cases, but the incidence is not quantifiable and the under-taxation may be minimal.

There have been, at times, calls to impose income tax on the business activities of charities however at this stage this is not being progressed by the Australian Federal Government and PBIs have not been the specific target of this proposal.⁷⁰

The FBT exemption for benefits to employees of PBIs

The FBT Act was introduced in 1986 to overcome the limits of the income tax legislation when dealing with non-cash benefits paid by employers to employees. The FBT Act aims to impose tax on most benefits provided to employees by their employers in forms other than salary and wages. Originally, there was no

⁶⁵ McGregor-Lowndes (n 18).

⁶⁶ Industry Commission (n 64) 275.

⁶⁷ Dal Pont, 'Conceptualising "Charity"' (n 43) 49.

⁶⁸ Taxation Review Committee, *Full Report* (1975).

⁶⁹ Krever (n 61) 5.

⁷⁰ Commonwealth of Australia, 'Better Targeting of Not-for-Profit Tax Concessions: Consultation Paper' (2011); A O'Connell, F Martin and J Chia, 'Law Policy and Politics in Australia's Recent Not-for-Profit Reforms' (2013) 28 Australian Tax Forum 289; F Martin, 'Recent Developments in Australian Charity Law: One Step Forward and Two Steps Backward' (2014) 17(2) Charity Law & Practice Review 23.

exemption of benefits paid to employees of PBIs. However, there was argument in the Senate during debate of the Bill, which pushed for concessions for a broad range of charitable organisations as it was considered that most charitable employers should be entitled to this tax benefit.⁷¹ The exemption for employee benefits of PBIs was then introduced prior to the Bill becoming law, with the amendment moved by Senator Peter Baume.⁷²

FBT exemptions take the form of either exempting the employer from FBT, subject to certain maximum benefit limits or allowing exemption from FBT for certain types of benefits. PBIs are eligible for an exemption of \$30,000 per employee.⁷³ Public and NFP hospitals are entitled to an exemption of \$17,000 per employee.⁷⁴ Until recently,⁷⁵ meal entertainment benefits⁷⁶ were unlimited,⁷⁷ so that in theory, a PBI could pay its chief executive officer their entire salary of say \$150,000 per annum in the form of a meal entertainment benefit and there would be no FBT nor would the employee pay any income tax. Meal entertainment benefits are the provision of entertainment through food or drink, accommodation for the purpose of facilitating this entertainment or the payment or reimbursement of expenses incurred in providing entertainment through the provision of food or drink or accommodation for that purpose.⁷⁸ There is no requirement that business or work issues are discussed as part of the meal entertainment benefit.⁷⁹

In order for the FBT Act to apply, there must be a 'benefit' provided by an employer to an employee or their associate in the course of the employee's employment. The term benefit is given a wide meaning under the Act. Examples of defined benefits are the provision of a car,⁸⁰ loans⁸¹ and expense payments.⁸²

71 O'Connell (n 35) 33-34.

72 The Parliament of the Commonwealth of Australia, Journals of the Senate, No 111, 3 June 1986, 1053. Although it appears that it was originally suggested by Senator Flo Bjelke-Petersen: see *ibid* 34.

73 FBT Act, ss 57A(1), 5B(1E).

74 *ibid* ss, 57A(1), (3), 5B(1E).

75 Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015 was passed in November 2015.

76 Defined in FBT Act, s 37AD.

77 *ibid* s 5E(3).

78 *ibid* s 37AD.

79 *ibid* s 37AD(d)-(g).

80 *ibid* s 7.

81 *ibid* s16.

82 *ibid* s 20.

The definition of employer is also broad.⁸³ All employers, including those past, present and future, are potentially liable for FBT.

The benefit must be ‘in respect of employment’. Section 148 expands this phrase so that a benefit can be provided in respect of employment even if it is also provided in respect of some other matter or thing. The benefit must be made to either an employee or their associate.⁸⁴

Part III: Calculation of the Employer’s Fringe Benefits Tax

Section 5A provides a simplified outline of Division 1 of Part IIA of the FBT Act. Division 1 explains how to work out an employer’s fringe benefits taxable amount for an FBT year. It is that amount on which the employer pays FBT. An employer’s fringe benefits taxable amount for an FBT year is worked out in accordance with section 5B.

As a result of the introduction of a goods and services tax (GST) from 1 July 2000, there are two types of fringe benefits:

Type 1 fringe benefits (for example, a car provided to an employee): These are fringe benefits that are GST-creditable benefits. In other words the employer is entitled to an input tax for the GST payable in respect of the benefit.

Type 2 fringe benefits (for example, a loan provided to an employee): These are all other fringe benefits. As there is no GST payable on loans (they are considered financial supplies and are input taxed under the GST legislation) there is no input tax credit.

Due to the different results that would have applied if GST-creditable benefits were not grossed-up to take into account the GST input tax credit available to an employer, fringe benefits need to be grouped according to type before all the separate fringe benefit amounts for each type are added together to produce the aggregate amount for each type. Once that has been done, a gross-up rate of 2.0802 is applied to the type 1 aggregate fringe benefits amount for benefits paid

83 *ibid* s 136.

84 The term ‘associate’ is defined in *ibid* s 159. It has the same meaning as in ITAA36, s 318 so therefore has a wide application and includes spouses, children and related entities. Section 159 also expands the meaning of ‘associate’ to include government authorities.

after 1 April 2014. For type 2 aggregate fringe benefits the gross-up rate for the same period is 1.8868.⁸⁵

Once the aggregate amount is determined plus any aggregate non-exempt amount, these two amounts are combined to produce the fringe benefits taxable amount for an employer.⁸⁶ The relevant FBT rate is then applied to the fringe benefits taxable amount to determine the FBT payable. The relevant FBT rate is 47 per cent from 1 April 2014. The rate was 46.5 per cent for the 2006-07 to 2013-14 FBT years. The following is an example of the way the exemptions work.

Example

Jane is an employee of a PBI. For the 2015 FBT year she receives \$120,000 per annum in salary. Her employer organises to repay her home mortgage so that she receives a 'loan' fringe benefit within section 16 of the FBT Act. The amount of the benefit to Jane is \$15,900 as this is the amount of interest payable on the mortgage for the year.

If Jane did not receive a loan fringe benefit her situation would be

Annual gross salary	\$120,000.00
Less benefits	\$0.00
Taxable income	\$120,000.00
Less PAYG (pay as you go) tax	-\$32,347.00
Less Medicare levy	-\$2,400.00
Take-home pay	\$85,253.00
*Less post-tax interest on loan	-\$15,900.00
Disposable income	\$69,353.00

Jane now takes \$15,900 as a loan fringe benefit.

Annual gross salary	\$120,000.00
Less benefits	-\$15,900.00
Taxable income	\$104,100.00
Less PAYG tax	-\$26,464.00
Less Medicare levy	-\$2,082.00
Take-home pay	\$75,554.00
*Less post-tax salary packaging benefits	\$0.00
Disposable income	\$75,554.00

85 ATO, 'Gross-up Rates for Fringe Benefits Tax' available at <https://www.ato.gov.au/rates/fbt/?page=3>

The gross-up rate for type 1 fringe benefits for 2015-16 and 2016-17 is 2.1463 and for type 2 is 1.9608 due to increases in the highest marginal tax rates.

86 FBT Act, s 5B.

The grossed-up value of the loan fringe benefit is $\$15,900 \times 1.8868 = \$30,000$ which is the maximum exempt benefit for an employee of a PBI.

By making use of the exempt benefits, Jane has increased her after-tax income by \$6,201. If she also took a meal entertainment benefit of \$20,000 to, for example, pay for her child's wedding, this would not be included in the cap and she would be able to reduce her taxable income by a further \$20,000 and therefore reduce her tax payable by an additional \$7,800.⁸⁷

Criticisms of the FBT concessions in respect of PBIs

The FBT concessions are the major anomaly between PBIs, other charities and for profit entities in terms of tax expenditure. Significant criticisms have been levied at the FBT exemptions available to employees of PBIs and other NFPs. The first is that employees of PBIs are eligible for FBT exemption capped at \$30,000, whilst employees of for profit entities operating in the same sector are not. This is a breach of the principle of competitive neutrality.

Competitive neutrality has been expressed as:⁸⁸

The competitive neutrality principle is that sellers of goods and services should compete on a level playing field; that is, one provider should not receive an advantage over another due to government regulation, subsidies or tax concessions.

Concerns about competitive neutrality are most likely to arise in an environment where one or more competitors receive significant government benefits - direct or indirect - not available to other competitors.

The concern about competitive neutrality is apparent when the health sector is considered. This is because, as stated earlier, the FBT exemption of \$30,000 applies to PBIs. For hospitals that are either public or NFP the exemption is \$17,000 but there is no exemption if the hospital is a private for profit hospital. For example, St Vincent's Hospital, Sydney is a PBI and therefore it is eligible for the \$30,000 exemption for its employees. Its related organisation St Vincent's Hospital, is a NFP but not a PBI, so its employees are able to access the \$17,000

87 ATO, 'Individual Income Tax Rates', available at <https://www.ato.gov.au/individuals/income-and-deductions/how-much-income-tax-you-pay/individual-income-tax-rates/>
For income over \$80,000 the rate is 37 cents in the dollar, plus the Medicare levy of 2 per cent for the 2014-15 year.

88 Productivity Commission (n 16) 198 [8.1].

exemption.⁸⁹ However, other for-profit hospitals are not eligible for any FBT exemption.

The result of the differing concessions leads to disparities between what can be paid in after tax dollars to hospital and aged care employees depending on who their employer is. This is particularly evident in the case of registered nurses who are subject to the same gross salaries due to uniform award conditions. Because of the varying concessions, a nurse employed in the aged care sector by a PBI who takes advantage of the \$30,000 concession will receive a significantly higher after tax salary than one employed by a NFP aged care provider. The same nurse will receive a lower after tax salary if employed by a NFP or public hospital than by the PBI but this will still be higher than the salary they receive from a for profit hospital.⁹⁰

The result is that nurses will tend to gain employment with PBIs first and then NFP and public hospitals at the expense of their for profit competitors. This is particularly difficult where qualified labour is in short supply. There seems little justification for this differential treatment especially as the Productivity Commission Report also pointed out that in practice the majority of NFP and public hospitals operate in a similar manner to for profit hospitals. 'Private hospitals - for profit and NFP - treat much the same patients, receive much the same fees and provide much the same services. Both also provide pro-bono services to those in need'.⁹¹

A further criticism is the fact that, until recently, there was no FBT cap on the provision of meal entertainment benefits. The exemption was originally introduced because of the difficulty of accounting for the provision of meals to hospital employees when most hospitals had a subsidised staff canteen.⁹² However, it is now widely promoted by firms that manage salary packaging arrangements as a way of paying for dinners, family weddings and overseas holidays tax free.⁹³ This concession is particularly inequitable as it is not available to for profit hospitals or aged care providers. It is also inequitable between

89 See Australian Government, 'ABN Lookup', available at <http://abr.business.gov.au/SearchByName.aspx?SearchText=St+Vincent%27s+hospital%2c+Sydney>

90 Productivity Commission (n 16) 212.

91 *ibid* 216.

92 *ibid* 214.

93 See e.g. Smart Salary, 'Meal Entertainment', available at: <http://www.smartsalary.com.au/MealCard/index.html>; International Medical Recruitment, 'Salaries and Tax', available at: <http://www.imrmedical.com/australia-salaries-tax>

employees, as greater benefits flow to those employees with higher salaries and those that have greater disposable incomes, so that they can spend their salaries on eligible items. Furthermore, employees with large one-off entertainment expenses such as a wedding will benefit relatively more in that year than other employees.⁹⁴ A working group established in 2012-2013 by the federal Government and tasked with looking into tax concessions and the NFP sector confirmed these criticisms. It found that '[U]ncapped access to meal entertainment and entertainment facility leasing benefits has raised concerns about the legitimacy of such concessions, especially since the rest of the community are not able to access such concessions or claim a deduction for such expenses'.⁹⁵ The Working Group also noted the problem of inequity between employees as the concession tends to 'be more highly utilised by eligible employees on higher salaries'.⁹⁶

An additional significant criticism of the meal entertainment benefit exemption is that it is subject to rorting. For example, some employees will use their ability to access this benefit by paying for restaurant meals for a group of friends using their employee credit card with which they access their meal entertainment benefit, and then collecting the friends' shares of the cost of the meal in cash, which they then pocket.⁹⁷

Those who argue in favour of these concessions state that they are effective in assisting PBIs to attract better quality employees without outlaying additional expenditure, and that subsidising these NFPs in another way such as through grants would not maintain the current situation.⁹⁸

As a result of the criticisms of the exemption of meal entertainment fringe benefits, the Federal Government proposed in its 2015 Federal Budget that this fringe

94 Productivity Commission (n 16) 213.

95 Treasury, Not-for-profit Sector Tax Concession Working Group, 'Fairer, Simpler and More Effective Tax Concessions for the Not-for-profit Sector: Final Report' (May 2013) 7.

96 *ibid.*

97 Productivity Commission (n 16) 215; *ibid*; G Winestock, 'Stop Doctors FBT Rort says Treasury Report' *Australian Financial Review* (5 March 2015) available at <http://www.afr.com/personal-finance/tax/stop-doctors-fbt-rort-says-treasury-report-20150305-13w74v>

98 See BDO, Submission to the Not-for-profit Sector Tax Concessions Working Group (17 December 2012) available at: http://www.bdo.com.au/__data/assets/pdf_file/0006/148551/BDO-Submissions-NFP-review.pdf

benefit would be capped at a grossed-up value of \$5,000.⁹⁹ Legislation putting this change into effect was passed by both Houses of Parliament on 25 November 2015.¹⁰⁰

The tax deductibility of gifts

In order for an entity to be a DGR it must be endorsed by the ATO.¹⁰¹ All PBIs that are also charities are eligible for endorsement as DGRs.¹⁰² The Australian Charities and Not-for-profits Commission (ACNC) was established in December 2012 and since then, all charities (which includes PBIs for this purpose) have been required to register with this Commission in order to then be eligible for tax concessions.¹⁰³ The ACNC's publicly available records indicate there are approximately 23,370 NFPs that are also DGRs. The majority of these, the ACNC states, are either charities or PBIs.¹⁰⁴

There are approximately 50 categories of DGRs in the ITAA97.¹⁰⁵ Apart from PBI status these include the listing of an entity by name under the gift provisions

contained in Division 30 of the ITAA97 or that the entity falls within one of the general categories set out in these provisions. PBIs and charities must register with the ACNC prior to applying to the ATO for endorsement. Certain other organisations such as environmental organisations and overseas aid funds require applications to be made to specific Commonwealth government departments first, before applying to the ATO.¹⁰⁶

99 Australian Government, 2015 Budget Paper No 2, 22-23. This measure will apply from 1 April 2016. S Maher, 'Budget 2015: Coalition Tackles Fringe Benefits Tax Loophole' *The Australian* (7 May 2015) available at: <http://www.theaustralian.com.au/national-affairs/treasury/budget-2015-coalition-tackles-fringe-benefits-tax-loophole/story-fn59nsif-1227339810281>

100 Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015.

101 ITAA97, s 30-20.

102 ITAA97, ss 30-45, 995-1.

103 Australian Charities and Not-for-profits Commission Act 2012 (Cth), s 20-5.

104 Australian Charities and Not-For-Profits Commission, 'Background to the Not-For-Profit Sector', available at: http://www.acnc.gov.au/ACNC/About_ACNC/Research/Background_NFP/ACNC/Edu/NFP_background.aspx?hkey=e88db8f0-3e48-4408-ab99-c2acb6ef8a1d

105 D Fittler, 'The Lowdown on DGR' (Working Paper No 59, 2013) 356.

106 *ibid* 358.

It seems generally accepted that NFPs aimed at relieving poverty and necessitous circumstances are targeting the core business of charities and are entitled to significant tax concessions.¹⁰⁷

As Gjems-Onstad has commented:¹⁰⁸

In many people's view, a modern society needs the private benevolent institutions. Just as the market a long time ago, the ideology of the welfare state has reached its limits. It is not so easy to provide for warm hearts by governmental appropriations. A caring society needs many approaches.

The PBI concept has however, been criticised as old fashioned and outdated,¹⁰⁹ although there do not appear to be any current government moves towards abolishing this entity.

The process of gaining DGR status has been subject to significant criticism as it is arguable that the current system is overly complex and this adds to the compliance burden of entities seeking DGR status. The 2010 Productivity Commission Report into the NFP sector¹¹⁰ stated that 'the current system of NFP tax concessions is complex, inefficient and inequitable, imposing substantial administrative costs on both NFPs and governments'.¹¹¹ A subsequent report into tax concessions for NFPs stated that 'the current system for granting DGR status is cumbersome, inequitable and anomalous' and that the 'framework is not well placed to handle organisations that carry out a range of purposes that fit within a number of DGR categories'. The Report further argued that reforming the framework would reduce red tape for eligible entities and potentially increase philanthropy by individuals and corporations.¹¹² The 2009 Review of Australia's Future Tax System stated that 'the system of concessions is complex and does not

¹⁰⁷ M Chesterman, 'Foundations of Charity Law in the New Welfare State' (1999) 62 *Modern Law Review* 333; Industry Commission (n 64) Recommendation 13, 21. This Report recommended a new NFP termed a 'Community Social Welfare Organisation' aimed at relieving poverty or benefitting the community through the advancement of social welfare.

¹⁰⁸ O Gjems-Onsted, "Money Pouring out of its Ears": On the Taxation of Really Non profit Organisations in Australia' (QUT Working Paper, 1993) 11.

¹⁰⁹ I Sheppard, R Fitzgerald and D Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) 9; Industry Commission (n 64) 21; Women with Disabilities Australia, 'Submission to the Public Inquiry into the Definition of Charities and Related Organisations' (2000).

¹¹⁰ Productivity Commission (n 16) 166.

¹¹¹ *ibid.*

¹¹² Not-For-Profit Sector Tax Concession Working Group (n 95) 5.

appropriately reflect current community values about the merit and social worth of activities'.¹¹³

These comments are not a criticism of the application of this concession to PBIs but rather an indictment of the system as a whole. The high compliance costs with which NFPs wishing to gain DGR status are burdened is clearly an area that needs examination and reform.

The current system of granting DGR status to NFPs that fall within the relevant categories such as PBIs does however breach the important tax policy criterion of 'equity'. One of the canons of tax policy is that taxpayers in like situations should be treated equally. This is often referred to as tax equity.¹¹⁴ 'Equity, or fairness, is a basic criterion for community acceptance of the tax system' and people generally expect that a tax system is fair.¹¹⁵ The current situation results in some charities (such as PBIs if we consider them a subset of charities) obtaining DGR status and not others. This creates inequity and inconsistency between charities as they are not treated equally by the tax regime.¹¹⁶

Part IV: The Limitations of PBIs engaging in Political Advocacy or Activity *The Interaction between PBIs and Charities*

From the case law discussed above we can say that although charity is not synonymous with PBI there is some overlap. Mildren J was prepared to accept in *Northern Land Council v Commissioner of Taxes (NT)* that:¹¹⁷

In *Perpetual Trustee Co v Commissioner of Taxation (Cth)* (1931) 45 CLR 224, both the context of the expression and the legislative history of the provisions of the Estate Duty Assessment Act 1914 (Cth) were relied upon by Starke J (at 231-2) and by Dixon J (at 233) as showing that the meaning was narrower than 'charitable institution' in its technical legal sense.

¹¹³ Australian Government, *Australia's Future Tax System* (2 May 2010) (Henry Review) [5.4] available at:
http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm

¹¹⁴ *ibid* [2.1].

¹¹⁵ Ralph Review of Business Taxation, *A Strong Foundation: Establishing Objectives, Principles and Processes* (Discussion Paper, 1998) [39]; *ibid* 29.

¹¹⁶ Industry Commission (n 64) 284; M McGregor-Lowndes and S Rodman, 'Charitable Organisations, the Industry Commission and Tax Office Audits: How a Stitch in Time Might Save Nine' (1995) CCH Journal of Australian Taxation 16, 17; M McGregor-Lowndes, 'The Advancement of Social Welfare - The Industry Commission's Defining Moment' (1995) 12(3) Australian Tax Forum 85.

¹¹⁷ *Northern Land Council v Commissioner of Taxes (NT)* (2002) 171 FLR 255, [15].

Therefore, a public benevolent institution (PBI) may be a charity in the legal sense, but not every such charity is a PBI.

Clearly there is overlap between the core focus of PBIs towards the relief of poverty or of sickness or helplessness and the first and fourth heads of the technical notion of charity (the relief of poverty, of sickness or the needs of the aged).¹¹⁸ As Chesterman has stated '[t]he equally significant category of "public benevolent institution" more clearly reflects the popular meaning of "charitable" (and the minority views in *Pemsel*) in its focus on relief of the needs of poor or disadvantaged people'.¹¹⁹

This overlap has resulted in the Full Court of the Federal Court suggesting that while 'public charity' is not 'synonymous' with 'public benevolent institution', 'the ordinary meanings of the two expressions are rather similar'.¹²⁰ It is therefore arguable that charity law cases, while not determinative of the content of the phrase 'public benevolent institution', should at least inform PBI developments. One example where this has occurred is certain cases that have referred to the approach under charity law when dealing with the issue of whether or not PBIs can charge fees.¹²¹

Government reports, including the 2001 Charity Definition Inquiry, also considered PBIs to be charities.¹²² Chesterman argues that the PBI entity encompasses a 'distinctly conservative view of charitable activity, according to which only traditional "relief" organisations can qualify as "public benevolent institutions"'.¹²³ He points out that those organisations whose activities are directed at 'changing the circumstances which either create or aggravate poverty or distress' are excluded as are entities that research, publish and advocate in order to help and represent other bodies which actually provide relief.¹²⁴ He bases the latter conclusion on statements by Priestley JA in *Australian Council of Social Service Inc v Commissioner of Pay-Roll Tax (NSW)*.¹²⁵ Priestley J had commented

118 See e.g. *Pemsel* (n 32) 583-584.

119 Chesterman (n 107) 342.

120 *Metropolitan Fire Brigades v Commissioner of Taxation* (1990) 27 FCR 279, 283; *Ashfield Municipal Council v Joyce* [1978] AC 122, 137.

121 *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1992] ATC 4307, 4312; T Carney and P Hanks, 'Taxation Treatment of Charities: Distributional Consequences for the Welfare State' in Krever and Kewley (n 61) 49, 76.

122 Sheppard et al (n 109) 31.

123 Chesterman (n 107) 342.

124 *ibid.*

125 85 ATC 4235.

in that case that an organisation that only concerned itself in an abstract way with the relief of poverty and distress and ‘manifests that concern by promotion of social welfare in the community’ was not a PBI.¹²⁶

In 2013 the Federal Government enacted the Charities Act 2013 (Cth) which establishes a statutory definition of charity and charitable purposes for all Federal Government purposes. The definition of charitable purposes is found in section 12(1), although it is not exhaustive. The charitable purposes articulated in the section include the traditional *Pemsel* heads of charity such as advancement of religion and education, together with new purposes of advancing social or public welfare or culture and promoting or protecting human rights. Section 15(1) expands the purpose of advancing social or public welfare so that it includes the *Pemsel* head ‘relieving the poverty, distress or disadvantage of individuals or families’. Section 12(1)(k) provides that charitable purposes under the Charities Act include any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) - (j) of section 12(1).

Item 7 of Schedule 2 of the transitional provisions states that, for the purposes of section 12(1)(k), a purpose that was a charitable purpose before the commencement of the Charities Act, and to which section 12(1) (a) - (j) and (l) does not apply, is treated as being ‘a purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) - (j) of that definition’.¹²⁷ The charitable purposes established under the common law are therefore continued after the enactment of the Charities Act.¹²⁸ Furthermore, the Explanatory Memorandum to the Charities Bill specifically refers to PBIs as a subtype of charity that is continued after the enactment of the Charities Act and the Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act).¹²⁹

Political Advocacy/Activity of Charities

In the case of *Aid/Watch Incorporated v Commissioner of Taxation* the issue was whether Aid/Watch Inc was prevented from being charitable by the English common law doctrine that charities could not engage in political activity or

126 *ibid* 4241.

127 Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth), item 7, sch 2.

128 This is confirmed in the House of Representatives, Explanatory Memorandum, ‘Charities Bill 2013 and Charities (Consequential Amendments and Transitional Provisions) Act 2013’ [2-15].

129 *ibid* [2.15]-[2.16].

advocacy.¹³⁰ This doctrine arose from *Bowman v Secular Society Ltd.*¹³¹ Aid/Watch's purpose was to improve the effectiveness of Australian and multinational foreign aid by monitoring the delivery of aid, conducting research and campaigning to influence government activities and policy.

Bowman v Secular Society Ltd concerned the validity of a bequest made to the Secular Society for a wide range of purposes, including the promotion of secular knowledge, freedom of enquiry, promotion of the secularisation of the state, and abolition of church establishment. The House of Lords held that these purposes were not illegal. It further held that there was an absolute gift to the Society. The majority judgment also considered that the Society's objects were not charitable because they were all 'purely political objects' and because:¹³²

[e]quity has always refused to recognize such objects as charitable. So, while an absolute gift for such purposes was valid, a trust for them was not: a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

The rationale for this approach has since been stated to include that granting charitable status to charities that advocate for law reform would result in the courts 'usurping' the legislature's role,¹³³ or that '[a] coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare'.¹³⁴

The majority in *Aid/Watch* stated that 'the generation by lawful means of public debate', at least in relation to government activities themselves falling under one of the four heads of charity, could be for the public benefit.¹³⁵ They also stated that by reference to the 'particular ends and means involved', a court could determine

¹³⁰ [2010] HCA 42.

¹³¹ [1917] AC 406. See also *McGovern v Attorney-General* [1982] Ch 321, 337 (per Slade LJ); GFK Santow, 'Charity in its Political Voice - a Tinkling Cymbal or a Sounding Brass?' (1999) 18 Australian Bar Review 225, 228-229.

¹³² *Bowman* (n 131) 442.

¹³³ *McGovern* (n 131) 337 per Slade LJ.

¹³⁴ *Aid/Watch* (n 130) [42] per French CJ, Gummow, Hayne, Crennan, Bell JJ, quoting *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396, 426 per Dixon J.

¹³⁵ *ibid* [47]-[48].

whether the particular encouragement of public debate is for the public benefit. The majority concluded that '[w]hat ... this appeal should decide is that in Australia there is no general doctrine which excludes from charitable purposes "political objects"'.¹³⁶

Even though Kiefel J dissented, her Honour similarly rejected the proposition that 'the political nature of an organisation's main purpose should mean its outright disqualification from charitable status'.¹³⁷ The majority also had this to say:¹³⁸

[T]he generation ... of public debate ... concerning the efficacy of foreign aid directed to the relief of poverty ... is a purpose beneficial to the community within the fourth head in *Pemsel*...

It ... is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* and, if so, the range of these activities.

As Harding has stated, they therefore expressed caution about endorsing as charitable, 'contributions to public debate about governmental activities that are not themselves charitable within the taxonomy laid out in *Pemsel*'.¹³⁹ Subsequently, Harding has argued that 'the majority in *Aid/Watch* recognised that agitating for the reform of government policy, while not itself a purpose that aims to provide a collective good, has a propensity to trigger or sustain public debate about the policy in question',¹⁴⁰ and that this in itself is a worthwhile contribution to a democracy like Australia.

Following the *Aid/Watch* decision, the Federal Government enacted the Charities Act which contains a definition of charitable purpose that includes the purpose of promoting or opposing a change to any law that furthers or aids one of the stated

¹³⁶ *ibid* [48].

¹³⁷ *ibid* [69].

¹³⁸ *ibid* [48].

¹³⁹ See M Harding, 'Finding the Limits of *Aid/Watch*' (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 34, 38; see also F Martin, 'The Legal Concept of Charity and its Expansion after the *Aid/Watch* Decision' (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 20; J Chia, M Harding and A O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Commissioner of Taxation* (2011) 35 *Melbourne University Law Review* 353.

¹⁴⁰ M Harding, 'What is the Point of Charity Law?' in K Barker and D Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013) 147, 166.

charitable purposes.¹⁴¹ Section 12(1)(l) of the Charities Act states that a charitable purpose is the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country as long as the change is in respect of one of the charitable purposes established in section 12(1)(a) - (k).

If it is accepted that PBIs are a subset or type of charity, then it is arguable that section 12(1)(l) applies, and that PBIs can promote or oppose a change to any law or policy or practice. Certainly, if the PBI wishes to gain tax concessions it must register as a charity with the ACNC in accordance with the ITAA97 which incorporates the common law concept of PBI.¹⁴² Section 12(1)(l) is subject to the proviso that such advocacy only relates to the charitable purposes set out in section 12(1)(a) - (k). PBI advocacy must of necessity be restricted to the charitable purposes 'advancing social or public welfare' as this is the charitable purpose most closely aligned to the PBI requirements.¹⁴³ We have seen from the comments in such cases as *Maclean Shire Council v Nungera Co-operative Society Ltd*¹⁴⁴ that a NFP is not eligible for PBI status if it has separate objects that are not directed towards benefitting those in compassionate or necessitous circumstances.

If instead, it is argued that the *Aid/Watch* decision made political advocacy a separate charitable purpose, although it has to be in respect of one of the traditional charitable purposes, then there are two issues that need to be examined. First, does *Aid/Watch* apply to PBIs given that it was a case dealing with a charity in the *Pemsel* sense, and second, did the decision survive the enactment of the Charities Act?

The statements in *Aid/Watch* discussed earlier indicate that the High Court considered that the generation of public debate about such a fundamental issue as alleviating poverty must be for the benefit of the public and an important aspect of Australian democracy.

141 Charities Act, s 12 (1)(l). Section 11(b) limits acceptable political advocacy by charities, in that it specifically makes the purpose of promoting or opposing a political party or a candidate for political office a disqualifying purpose.

142 ITAA97, s 995-1 defines a 'registered public benevolent institution' as an institution that is: (a) a registered charity; and (b) registered under the Australian Charities and Not-for-profits Commission Act 2012 as the subtype of entity mentioned in column 2 of item 14 of the table in subsection 25-5(5) of that Act. The entity referred to in item 14 is a 'public benevolent institution'.

143 Charities Act, s 12 (1)(c).

144 (1994) 84 LGERA 139, 143.

The majority strongly supported the role of the Australian Constitution and the relationship between electors and the legislators to ensure a robust political system. They stated:¹⁴⁵

In Australia, the foundation of the ‘coherent system of law’ of which Dixon J spoke in *Royal North Shore Hospital* is supplied by the Constitution. The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise ... Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is ‘an indispensable incident’ of that constitutional system...the Constitution informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government.

They went so far as to say that ‘it is the operation of these constitutional processes which contributes to the public welfare’.¹⁴⁶ Such comments are certainly capable of supporting an argument that advocacy for change regarding poverty and those in necessitous circumstances must fall within the central theme of contribution to Australian public welfare. It therefore seems reasonable to conclude, as far as a PBI concerns itself with the first *Pemsel* head of charitable purpose, relief of poverty, that the High Court in *Aid/Watch* envisaged that a PBI also able to engage in advocacy to generate public debate.

We recall that item 7 of Schedule 2 of the transitional provisions to the Charities Act states that, for the purposes of s12(1)(k), a purpose that was a charitable purpose before the commencement of the Act, and to which section 12(1) (a) - (j) and (l) does not apply, is treated as being ‘a purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) - (j) of that definition’.¹⁴⁷ The transitional provisions are clearly intended to ensure that charitable purposes not caught by section 12(1) of the Charities Act, but that existed prior to the enactment, continue in effect. If this is truly the case, and my analysis of *Aid/Watch* is correct, that *Aid/Watch* stands for a new charitable purpose of political advocacy in respect of poverty (as one of the traditional heads of charity), then arguably this new charitable purpose continues to exist.

¹⁴⁵ n 130 [44].

¹⁴⁶ *ibid* [45].

¹⁴⁷ Charities (Consequential) Act (n 127) item 7, sch 2.

But the issue still remains - does *Aid/Watch* or the Charities Act apply to all PBIs? The ACNC Act provides for the registration of all charities in Australia. Registration enables a charity to be entitled to federal tax exemptions, including exemption from income tax. Section 25-5 item 6 states that a PBI is entitled to registration. In other words, for the purposes of federal tax exemptions and the other provisions of the ACNC Act a PBI must also be a charity. Section 25-5 also notes that a NFP can be registered with the ACNC as an entity with a purpose that is the relief of poverty, sickness or the needs of the aged, and also be registered as a PBI. This allows for the situation where the entity is both a charity for the relief of poverty, sickness and needs of the aged and also a PBI.

Even though the Charities Act itself is silent on its application to PBIs, it seems that the provisions of the ACNC Act and the comments in the Explanatory Memorandum to the Charities Act indicate that a PBI is a charity. This view is also supported by most of the case law on PBIs. Following this reasoning, a PBI, as a charity, should be entitled to take advantage of section 12(1)(l) and advocate for legislative, government or policy change. Such advocacy must however be limited to PBI purposes, as including other purposes would take it outside the PBI concept. As Handley JA stated in *McLean Shire Council v Nungera Co-operative Society*, the objects of the Nungera Society contained a preamble which read ‘The objects of the Society shall be to relieve the poverty, sickness, destitution, distress, suffering, misfortune or helplessness of needy members of the Aboriginal community in the Maclean and surrounding areas of New South Wales through...’¹⁴⁸ The court held the Preamble was the primary objective and the succeeding objectives ancillary to the main objective. As such they did not prevent the Nungera Society from being a PBI.¹⁴⁹

My final issue is whether an entity could be solely for the advocacy of a change in the law in relation to ‘advancing social or public welfare’ and also a PBI. In other words, it is purely a lobbying organisation. If we consider that a PBI is first a charity, and then must satisfy the additional PBI criteria, it seems unlikely that its purposes can be so limited. The common law on PBIs is quite clear that they must have some form of ‘concrete’ benevolence towards relief of suffering, misfortune and so on, even though this may not, after the *Hunger Project Case*, be direct.

Conclusion

PBIs are clearly able to access the most generous tax concessions available to the NFP sector. These concessions are also a significant cost to the federal revenue.

¹⁴⁸ *Maclean Shire Council* (n 46).

¹⁴⁹ *ibid* 433.

The arguments in favour of income tax exemption and DGR status as outlined in this article are robust and in keeping with generally accepted public policy rationales, although there are some criticisms that may be levelled against the current approach to granting DGR status on complexity and inequity grounds. However, the FBT concessions are much more controversial and subject to strong criticisms on equity grounds. Although these criticisms have been highlighted by several reviews and reports it needs a strong political will to withdraw the concessions. The Federal Government has recently answered some of these criticisms by capping the concession for meal entertainment benefits to a maximum of \$5,000. This is a positive move towards reducing inequities between high and low paid employees of PBIs and also addressing the inequity between hospitals able to access the concessions and for-profit hospitals that cannot.

Finally, it is arguable that PBIs can engage in the stimulation of public debate about matters relating to relieving poverty and so on without losing their PBI status. Arguably, PBIs that are focused on relief of poverty, sickness and the aged can take advantage of the advocacy provisions in the Charities Act as they are both charities and PBIs. Other PBIs, with a broader focus, may be totally excluded from this legal development. It does seem clear that an entity that is solely engaged in political advocacy or lobbying cannot be a PBI. So PBIs should be careful to ensure that advocacy does not become a separate objective, as the case law indicates this will lose them their PBI status and nothing in the Charities Act, ITAA97 or ACNC Act indicates a contrary view.